Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1993

ANTONIO S. HIDALGO,

Petitioner,

vs.

FEATHERLITE BUILDING PRODUCTS CORPORATION,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the 1991 Amendment to Section 1981 of Title 42, United States Code (Public Law 102-166, Section 101), apply retroactively to conduct occurring before the effective date of the Amendment?

LIST OF PARTIES

The names of all parties to this action appear in the style. Defendant has no parent company and no subsidiaries other than wholly-owned subsidiaries.

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No._____

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The Petitioner, Antonio S. Hidalgo, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled proceeding on December 27, 1993.

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

Neither the opinion of the District Court, nor that of the Court of Appeals, was officially published. The attorney for Petitioner is unaware of any unofficial reports of these opinions.

JURISDICTION

The petition herein seeks review of a Judgment of the United States Court of Appeals for the Fifth Circuit, entered on December 27, 1993. Thereafter, Petitioner filed a timely motion for rehearing, which the Court of Appeals overruled on January 25, 1994. The statutory provision believed to confer on this Court jurisdiction to review the Judgment in question by Writ of Certiorari is Title 28, United States Code, Section 1254, subparagraph (1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Section 1981 of Title 42, United States Code, provides as follows:

"§ 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make

and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) Definition

For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

(As amended Pub.L. 102-166, Title I, § 101, Nov. 21, 1991, 105 Stat. 1071.)"

Subsection (b) is a part of Public Law 102-166, which provides in pertinent part as follows:

"**Sec. 402. Effective date.**

Except as otherwise specifically provided, this act and the amendments made by this act shall take effect upon enactment."

STATEMENT OF THE CASE

In Mr. Hidalgo's original complaint, he alleged causes of action for age discrimination under 29 U.S.C. § 626 and for intentional discrimination on the basis of race under the provisions of 42 U.S.C. § 1981. There never was any claim under Title VII of the 1964 Civil Rights Act.

Almost all of the factual allegations in the original complaint had to do with discrimination on the basis of race, rather than age. These allegations were substantial and specific, including repeated instances of blatantly racial slurs, disparate treatment, false accusations, constructive discharge, and replacement by a non-Hispanic. The only allegation concerning age was that Mr. Hidalgo's replacement was ten years younger.

The inclusive dates alleged by Mr. Hidalgo for this course of conduct were from April of 1984 through January 25, 1991, the date Mr. Hidalgo was terminated for refusing to accept transfer to a new position in a city approximately 800 miles away. Mr. Hidalgo filed his original complaint in District Court on January 11, 1993.

About four and one-half months after filing his original complaint, Mr. Hidalgo amended his pleadings to dismiss and abandon his claims for age discrimination, without prejudice, pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil

Procedure. This amendment left Mr. Hidalgo's Section 1981 claim as his only cause of action. Featherlite Building Products Corporation answered and moved for judgment on the pleadings on the basis of the Supreme Court's decision in *Patterson v. McClean Federal Credit Union*, 491 U.S. 164, 109 S. Ct. 2363, 105 L.Ed.2d. 132 (1989). Mr. Hidalgo made a very brief response, relying upon the 1991 Civil Rights Act, which President Bush signed on November 21, 1991, and which legislatively overruled *Patterson*.

The District Court granted the motion for judgment on the pleadings, holding the 1991 Civil Rights Act to be prospective only, in accordance with the Fifth Circuit's decisions in *Johnson v. Uncle Ben's Inc.*, 965 F.2d. 1263, 1373-1374 (5th Cir. 1992), cert. pending U.S.L.W. 3356; *Landgraf v. USI Film Products*, 968 F.2d. 427, 432-433 (5th Cir. 1992), cert. granted 113 S.Ct. 1250; and also the case of *Harvis v. Roadway Express Inc.*, 973 F.2d. 490, 495-497 (6th Cir. 1992), cert. granted *sub nom Rivers v. Roadway Express Inc.*, 113 S.Ct. 1250 (1993).

Mr. Hidalgo appealed to the United States Court of Appeals for the Fifth Circuit. In that appeal, Mr. Hidalgo requested that the Court reverse the District Court's decision holding the 1991 Civil Rights Act not retroactive. In the alternative, Mr. Hidalgo requested that the Court of Appeals await guidance from the Supreme Court on the retroactivity issue before making a decision. Despite such pleas, the Court

of Appeals affirmed the District Court. In his motion for rehearing and suggestion of en banc consideration, Mr. Hidalgo pointed out to the Court of Appeals that the Supreme Court had before it cases which would resolve the issue, and he once again urged the Court to postpone the decision so that it would not be necessary for him to burden the Supreme Court's docket with a certiorari petition. The motion for rehearing was denied, and the suggestion of en banc consideration overruled without a single judge having requested a poll.

ARGUMENT

Without belaboring the point, it will suffice to say that the outcome of this case depends on how the Supreme Court decides the case of *Rivers v. Roadway Express Inc.*, supra, argued 10/13/93. If the Supreme Court affirms the decision of the Court of Appeals in that case, then Mr. Hidalgo is out of luck in this case. On the other hand, if the Supreme Court reverses the Court of Appeals decision in *Rivers*, thus holding retroactive the 1991 Amendment to Section 1981, then Mr. Hidalgo is entitled to a trial on his 1981 claim.

There is one other possibility: the Supreme Court's decisions in *Landgraf* and *Rivers* may not be dispositive in this case. Both of those cases had already been tried (but the decisions had not become final) on November 21, 1991, the effective date of the new Civil Rights Act. No proceedings

in Mr. Hidalgo's case occurred before that date. It is possible that the Supreme Court will hold the new law inapplicable to cases tried before its effective date, but not decide whether it applies to cases like Mr. Hidalgo's, where the discriminatory acts occurred before the effective date, but all legal proceedings occurred after.

Depending upon how the Supreme Court decides *Rivers*, it should decide this case as follows:

1. If the Supreme Court decides that the 1991 Civil Rights Act is fully retroactive, it should grant the petition for certiorari in this case and remand it to the Court of Appeals, without hearing oral argument, for reconsideration in light of the *Rivers* decision.

2. If the Supreme Court decides that the new law applies only to conduct occurring on or after its effective date, then it should deny this petition for certiorari.

3. If the Supreme Court decides that the 1991 Civil Rights Act is inapplicable to cases tried before its effective date, but fails to decide whether it applies to cases such as Mr. Hidalgo's, then the Court should grant the petition for certiorari in this case, schedule the matter for briefing and oral argument, and use this case as its vehicle to decide whether the 1991 Civil Rights Act applies in cases where the conduct occurred before passage of the 1991 Act, but the trial occurs after.

CONCLUSION

It is respectfully submitted that, for the reasons outlined above, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

/s/ Mike Milligan

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

ANTONIO S. HIDALGO,

Plaintiff,

vs.

FEATHERLITE BUILDING PRODUCTS CORPORATION,

Defendant.

OPINION AND ORDER

On May 28, 1993, Defendant filed a Motion for Judgment on the Pleadings. For the reasons set forth below, it is hereby

ORDERED that Defendant's motion is granted and judgment entered in Defendant's favor dismissing Plaintiff's Amended Original Complaint for failure to state a claim.

A motion for judgment on the pleadings should be sustained where the undisputed facts appearing in the pleadings show that no relief can be granted to the Plaintiff. *J. M. Blythe Motorlines Corp. v. Blalock,* 210 F.2d. 77 (5th Cir. 1962); Rules 12(c) and 12(h)(2) of the Federal Rules of Civil Procedure.

In his Amended Original Complaint, Plaintiff alleges entitlement to relief only under 42 U.S.C. § 1981, for an alleged constructive discharge from employment occurring on January 10, 1991. As stated by the court in *Reeves v. MCI Telecommunication*, 909 F.2d. 144 (5th Cir. 1990), claims for discriminatory discharge are not actionable under 42 U.S.C. § 1981 after the decision in *Patterson v. McClean Credit Union*, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d. 132 (1989). In *Patterson*, the Supreme Court held that, to state a claim under 42 U.S.C. § 1981, the "plaintiff's claim must involve improper 'conduct at the initial formation of the contract' or 'conduct which impairs the right to enforce contract obligations through legal process.'" *Lavender v. V & B Transmission & Auto Repair*, 897 F.2d. 805, 807 (5th Cir. 1990) (quoting *Patterson*, 109 S.Ct. at 2374).

Since termination occurs after formation of the employment contract, discriminatory termination claims, by their nature, are not actionable after *Patterson*. *Reeves v. MCI Telecommunication, supra; Lavender v. V & B Transmission & Auto Repair, supra. See also, Carter v. South Central Bell*, 912 F.2d. 832 (5th Cir. 1990). Plaintiff does not claim Defendant engaged in any conduct which impaired his right to enforce contract obligations through legal process.

The Civil Rights Act of 1991, 42 U.S.C. § 2000e, *et. seq.*, which legislatively reversed *Patterson*, took effect upon its enactment on November 21, 1991. The Fifth Circuit Court of

Appeals has consistently held that the provisions of the Act do not apply retroactively. *Johnson v. Uncle Ben's Inc.*, 965 F.2d. 1363, 1373-74 (5th Cir.), *cert. filed*, 61 U.S.L.W. 3356 (1992) (§ 101 of Civil Rights Act of 1991, reversing *Patterson*, does not apply retroactively to conduct occurring prior to the Act); *Landgraf v. USI Film Products*, 968 F.2d. 427, 432-33 (5th Cir. 1992), *cert. granted* _____ U.S. _____, 113 S.Ct. 1250 (1993) (Civil Rights Act of 1991 does not apply to extend damage and jury trial provisions under Title VII to conduct occurring before the effective date of the Act). *See also Harvis v. Roadway Express, Inc.*, 973 F.2d. 490, 495-497 (6th Cir. 1992), *cert. granted* _____ U.S. _____, 113 S.Ct. 1250 (1993) (Civil Rights Act of 1991 does not apply retroactively to extend § 1981 protection to discharged employee; *Patterson* applies), combined in grant of *certiorari* with *Landgraf, supra.*

In his response to Defendant's motion, Plaintiff concedes that the issue is whether the 1991 Civil Rights Act applies retroactively and that this issue has been "resolved against Plaintiff's position in this Circuit . . . ." Plaintiff's Response to Defendant's Motion for Judgment on the Pleadings at 2. Although the United States Supreme Court has granted *certiorari* in *Landgraf, supra,* the current state of the law in this Circuit requires that Defendant's motion be granted.

Plaintiff's Complaint as amended asserts only a cause of action under 42 U.S.C. § 1981, in form of an alleged con-

structive discharge which occurred on January 10, 1991, prior to passage of the 1991 Civil Rights Act. As Plaintiff's claim does not exist under the current state of the law, Defendant's Motion for Judgment on the Pleadings should be and hereby is granted. F.R.C.P. §§ 12(c) and 12(h)(2).

SO ORDERED.

This the 24th day of June, 1993.

LUCIUS D. BUNTON
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8521
Summary Calendar

ANTONIO S. HIDALGO,

Plaintiff-Appellant,

VERSUS

FEATHERLITE BUILDING PRODUCTS CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(EP-93-CV-8)

Before DAVIS, JONES and DUHÉ, Circuit Judges.

PER CURIAM:[1]

Antonio S. Hidalgo challenges the district court's dismissal of his action against his former employer for constructive discharge. Hidalgo concedes that the district court's judgment is correct under *Patterson v. McClean Federal Credit*

Union, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d. 132 (1989) and *Reeves v. MCI Telecommunication*, 909 F.2d. 144 (5th Cir. 1990). Hidalgo contends, however, that the Civil Rights Act of 1991 legislatively overruled those decisions and that the Act should be applied retroactively to conduct occurring before the Act. Under the law of this circuit, the provisions of the Act do not apply retroactively. *Johnson v. Uncle Ben's, Inc.*, 965 F.2d. 1363 (5th Cir. 1992), *cert. filed*, 61 U.S.L.W. 3356. The district court correctly dismissed this suit.

AFFIRMED.

[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8521

ANTONIO S. HIDALGO,
Plaintiff-Appellant,

versus

FEATHERLITE BUILDING PRODUCTS CORPORATION,
Plaintiff-Appellee.

Appeal from the United States District Court for the Western District of Texas

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 12-27-93, 5 Cir. _____, _____ F.3d. _____)
(01-25-94)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

W. EUGENE DAVIS
UNITED STATES CIRCUIT JUDGE